

James R. Touchstone, SBN 184584  
jrt@jones-mayer.com  
Denise L. Rocawich, SBN 232792  
dlr@jones-mayer.com  
JONES MAYER  
3777 North Harbor Boulevard  
Fullerton, CA 92835  
Telephone: (714) 446-1400  
Facsimile: (714) 446-1448

Attorneys for Defendants CITY OF REDLANDS and OFFICER KOAHOU

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JUSTIN CODY HARPER,

Plaintiff,

vs.

CITY OF REDLANDS, REDLANDS  
POLICE DEPARTMENT, POLICE  
OFFICER KOAHOU, and DOES 1  
through 10 Inclusive,

Defendants.

Case No.: CV23-00695 SSS (KK)  
Judge: Hon. Sunshine Sykes

**DEFENDANTS' LOCAL RULE 16-4  
MEMORANDUM OF CONTENTIONS  
OF FACT AND LAW**

**Final Pre-trial Conference**

Date: April 4, 2025  
Time: 1:00 pm  
Courtroom: 2

**Trial**

Date: April 21, 2025  
Time: 9:00 am  
Courtroom: 2

Complaint Filed: April 19, 2023

1 **MEMORANDUM OF CONTENTIONS OF FACT AND LAW**

2 Pursuant to Local Rule 16-4, Defendants, City of Redlands and Officer  
3 Koahou, respectfully submits the following Memorandum of Contentions and Fact  
4 and Law in the above-captioned matter set for trial on April 21, 2025.  
5

6 **I. INTRODUCTION**

7 On September 9, 2021, at approximately 4:00 a.m., Plaintiff Justin Harper  
8 smoked methamphetamine, taking approximately “10 hits.” Ever since he was 18,  
9 Harper had smoked methamphetamine every few hours, conduct which would  
10 cause him to become “irritated” and which had caused him to get into  
11 approximately 10 to 15 physical fights. Harper has a criminal history which was so  
12 extensive that he had trouble recalling it during his deposition, but he did admit  
13 that he had a prior “strike” prior, another prior for felony evading, and was on  
14 “PTRS” (a cross between parole and probation) at the time of these events. Harper  
15 also admitted that he had been kicked out of school in the Fourth Grade, he never  
16 went to high school, he had never had a “real job” and he never obtained a driver’s  
17 license.

18 Approximately 8 hours later, Harper and his passenger, a woman named Lia  
19 More, were driving in a stolen Toyota Tundra pickup truck. As Harper was  
20 driving, he became aware that Officer Koahou was behind him and tried to get  
21 away from him by running red lights and driving at speeds of 85 to 90 mph. Harper  
22 failed to stop at a stop sign, struck a curb, lost control, and struck a work vehicle  
23 driven by Joseph Garcia and in which Corey Guerra was a passenger. After  
24 striking the work vehicle, Harper did not stop but instead fled the scene in the  
25 stolen Toyota. However, the stolen Toyota was damaged to the point that it could  
26 no longer be driven. Harper abandoned the stolen Toyota and both he and Moore  
27 fled the scene on foot.

28 Meanwhile, Garcia and Guerra were driving around and attempting to locate

1 Harper after he had hit their work vehicle. As Garcia and Guerra were searching  
2 for Harper, Harper approached them and asked for a ride, but once again fled on  
3 foot when he saw they were the two men he had struck with the stolen Toyota.  
4 Harper ran through multiple yards attempting to evade Officer Koahou as well as  
5 Garcia and Guerra.

6 Meanwhile, Martin Salazar was in the driveway of his home detailing his  
7 aunt's black Honda Accord and had the car running to allow the air conditioner to  
8 cool the inside of the car. Harper approached the black Honda, jumped in, and  
9 attempted to drive off. When Salazar yelled at Harper to get out and tried to  
10 prevent him from driving off, Harper used force to try shake Salazar from the car  
11 causing him to lose his balance and get dragged by the car. At this moment, Garcia  
12 and Guerra arrived on scene and saw the struggle between Salazar and Harper.  
13 When Salazar yelled for help, his neighbor Greg Gallo and Garcia attempted to  
14 assist in forcing Harper from the car while Guerra called 911. The struggle  
15 between the men became physical with the men attempting to subdue and strike  
16 Harper and pull him from the car.

17 When Officer Koahou arrived on scene, he observed the men struggling with  
18 Harper and ordered them to move away so they would not be shot. In response to  
19 this order, Garcia and Gallo moved away from the car as Officer Koahou  
20 approached the vehicle. Officer Koahou's subsequent interactions with Harper  
21 were recorded on his belt-worn audio recording device. Officer Koahou ordered  
22 Harper to get out of the car multiple times; however, Harper refused to do so. The  
23 stolen Honda was still running and Officer Koahou was concerned that Harper  
24 would attempt to flee again. When Harper refused multiple orders to get out of the  
25 vehicle, Officer Koahou deployed his taser.

26 After the taser was deployed, Harper started to reach for the gear shift of the  
27 vehicle. Officer Koahou attempted to pull Harper's hand from the gear shift and  
28 attempted to put the car in park. Officer Koahou yelled, "Don't do it! Don't do it!

1 I'll shoot you! Stop! Stop!" Harper hit the accelerator, causing the car to move.  
2 Officer Koahou was reaching inside the car when the vehicle started to move.  
3 Officer Koahou attempted to pull back away, but his arm was trapped on Harper's  
4 chest. As the car started to move forward, Officer Koahou fired two defensive  
5 shots without aiming. As the vehicle continued to move forward, the car's  
6 momentum slammed the door on Officer Koahou. Both shots were fired within a  
7 mere 5 seconds of the deployment of the taser and before the car door struck him.  
8 Officer Koahou did not fire at Harper merely because Harper was driving away;  
9 rather, he felt that he was an imminent threat and was attempting to stop the threat.

10 After the shots were fired, the car continued to accelerate and drove for  
11 another few hundred feet before crashing. After the car came to rest, Harper got  
12 out of the car on his own. Harper was subsequently handcuffed, a tourniquet was  
13 applied to his leg, and he was transported to Loma Linda Medical Center. A  
14 shotgun was subsequently recovered from inside the stolen Toyota. As a result of  
15 these actions, Harper was convicted of theft of the Toyota, hit and run with damage  
16 on Garcia's work truck, possession of the shotgun, and carjacking of the black  
17 Honda. After he was sentenced to State Prison for these offenses, Harper continued  
18 to have problems including approximately 10 write-ups with four or five being for  
19 battery. Harper currently expects to be released from prison in 2026.

20 Harper filed a Complaint for damages against Defendants alleging various  
21 causes of action on April 19, 2023.

## 22 23 **II. CLAIMS AND DEFENSES [L.R. 16-4.1]**

24 The Complaint alleges the following Claims for Relief against the City and  
25 Officer Koahou (1) Violation of 42 U.S.C. Section 1983 [Excessive Force]; (2)  
26 Battery; (3) Negligence; (4) Violation of California Civil Code 52.1 [Bane Act].<sup>1</sup>

27  
28 <sup>1</sup> Plaintiff also plead a claim for Negligent Infliction of Emotional Distress but agreed not to pursue it during the Motion for Summary Judgment meet and confer process.

1           **A. Summary of Plaintiff's Claims [L.R. 16-4.1(a)]**

2  
3                   **1. Plaintiff's First Claim for Violation of 42 U.S.C. § 1983**

4           Plaintiff's First Claim for Relief is for Violation of 42 U.S.C. § 1983  
5 [Excessive Force].

6                   **(a) Elements of the First Claim**

7           To establish a claim under section 1983 against Officer Koahou, Plaintiff  
8 must demonstrate (1) that the alleged wrongful action occurred "under color of  
9 state law;" and (2) that the action resulted in the deprivation of a constitutional  
10 right or federal statutory right. Jones v. Williams, 297 F.3d 930, 934 (9<sup>th</sup> Cir.  
11 2002); See also Ninth Circuit Manual of Model Jury Instructions: Civil § 9.3  
12 (2017). Where, as here, the claimed deprivation of a constitutional right is the use  
13 of allegedly-excessive force, Plaintiff must demonstrate that the force used against  
14 Justin Harper on September 9, 2021 was objectively unreasonable under all the  
15 circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed.  
16 2d 443 (1989); Palacios v. City of Oakland, 970 F. Supp. 732, 740 (N.D. Cal.  
17 1997); see also Ninth Circuit Manual of Model Jury Instructions: Civil § 9.25  
18 (2017).

19           A determination of the extent to which a particular use of force is  
20 "reasonable" cannot be achieved through a mechanical application of a particular  
21 test. Instead, the appropriate analysis "requires careful attention to the facts and  
22 circumstances of each particular case, including the severity of the crime at issue,  
23 whether the suspect poses an immediate threat to the safety of the officers or  
24 others, and whether he is actively resisting arrest or attempting to evade arrest by  
25 flight." Graham, 490 U.S. at 396 *citing* Tennessee v. Garner, 471 U.S. 1, 8-9, 105  
26 S.Ct. 1694, 85 L. Ed. 2d 1 (1985).

27           The inquiry is an objective one, the question being whether the officers'  
28 actions are objectively reasonable in light of the facts and circumstances

1 confronting them without regard to the officers' underlying intent or motivation,  
2 and without the "twenty/twenty vision of hindsight." Graham, 490 U.S. at 396-97;  
3 Palacios, 970 F. Supp. at 740. Police officers are not required to use the least  
4 intrusive degree of force possible; they are required only to act within a reasonable  
5 range of conduct. Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994); Forrester v.  
6 City of San Diego, 25 F.3d 804, 806-807 (9th Cir. 1994).

7 Although an officer may not use deadly force to apprehend a suspect when  
8 the suspect poses no immediate threat to the officer or others, "it is not  
9 constitutionally unreasonable to prevent escape using deadly force '[w]here the  
10 officer has probable cause to believe that the suspect poses a threat of serious  
11 physical harm, either to the officer or to others.'" Wilkinson v. Torres, 610 F.3d  
12 546, 551 (9th Cir.2010) *quoting* Garner, 471 U.S. at 11. The Supreme Court has  
13 indicated that "judges should be cautious about second-guessing a police officer's  
14 assessment, made on the scene, of the danger presented by a particular situation."  
15 Ryburn v. Huff, 565 U.S. 469, 477 (2012). Moreover, the most important single  
16 element of the three specified factors is whether the suspect poses an immediate  
17 threat to the safety of the officers or others. Smith v. City of Hemet, 394 F.3d 689,  
18 702 (9th 2005).

19 "The government has an undeniable legitimate interest in apprehending  
20 criminal suspects, . . . and that interest is even stronger when the criminal is . . .  
21 suspected of a felony." Miller v. Clark Cty., 340 F.3d 959, 964 (9th Cir. 2003)  
22 [citations omitted]. When dealing with a felony suspect, the "severity of the crime"  
23 factor "strongly favors the government." *Id.*

24 **(b) Evidence in Opposition to the First Claim**

25 Officer Koahou will testify, and audio and video evidence will show, that  
26 when viewed from the perspective of a reasonable officer at the scene on  
27 September 9, 2021, the use of force at issue in this case was reasonable as a matter  
28 of law. Officer Koahou will testify, and other evidence will show, that Officer

1 Koahou made the split-second decision to shoot under the following  
2 circumstances:

- 3 ● Harper had a prior conviction for felony evading.
- 4 ● Harper had smoked methamphetamine on the day of the shooting, taking  
5 approximately “10 hits.”
- 6 ● Ever since he was 18, Harper had smoked methamphetamine every few  
7 hours, conduct which would cause him to become “irritated” and which had  
8 caused him to get into approximately 10 to 15 physical fights.
- 9 ● Harper has an extensive criminal history including a strike offense.
- 10 ● Harper and his passenger, a woman named Lia More, were driving in a  
11 stolen Toyota Tundra pickup truck.
- 12 ● Harper led Officer Koahou on a high speed pursuit at speeds of 85 to 90  
13 mph.
- 14 ● Harper failed to stop at a stop sign, struck a curb, lost control, and struck a  
15 work vehicle driven by Joseph Garcia and in which Corey Guerra was a  
16 passenger.
- 17 ● After striking the work vehicle, Harper did not stop but instead fled the  
18 scene in the stolen Toyota. However, the stolen Toyota was damaged to the  
19 point that it could no longer be driven. Harper abandoned the stolen Toyota  
20 and both he and Moore fled the scene on foot.
- 21 ● Harper ran through multiple yards attempting to evade Officer Koahou as  
22 well as Garcia and Guerra.
- 23 ● Harper was a felon in possession of a firearm during the pursuit as there  
24 was a shotgun in the stolen Tundra.
- 25 ● Harper carjacked another vehicle when the Tundra became disabled  
26 physically fighting with the car’s owner.
- 27 ● Officer Koahou ordered Harper to get out of the car multiple times;  
28 however, Harper refused to do so. T



- Officer Koahou attempted to tase Harper, but the TASER was ineffective.
  - After the taser was deployed, Harper started to reach for the gear shift of the vehicle.
  - Officer Koahou attempted to pull Harper's hand from the gear shift and attempted to put the car in park.
  - Officer Koahou yelled, "Don't do it! Don't do it! I'll shoot you! Stop! Stop!"
  - Harper hit the accelerator, causing the car to move.
  - Officer Koahou was reaching inside the car when the vehicle started to move.
  - Officer Koahou attempted to pull back away, but his arm was trapped on Harper's chest.
  - As the car started to move forward, Officer Koahou fired two defensive shots without aiming.
  - As the vehicle continued to move forward, the car's momentum slammed the door on Officer Koahou.
  - Both shots were fired within a mere 5 seconds of the deployment of the taser and before the car door struck him.
  - After the shots were fired, the car continued to accelerate and drove for another few hundred feet before crashing.
  - In the seconds before the shots were fired and as the shots were fired, Harper had begun to accelerate placing Officer Koahou at extreme risk.
  - The threat posed by Harper was a clear and immediate threat to the life of Officer Koahou who was mere inches away from being crushed by the vehicle driven by Harper.
  - Harper was a fleeing felon who posed a sufficient threat to the public at large.
- Additionally, expert Clark will testify that the behavior of Mr. Harper as



1 described by witnesses, police, emergency department staff and videos from  
2 September 9, 2021, is consistent with being under the influence of and intoxicated  
3 by a stimulant drug such as methamphetamine. His agitated behavior, attempting to  
4 carjack a running car, drive it away while individuals were near the vehicle and  
5 almost striking them, and failing to comply with warnings by a police officer prior  
6 to being shot are consistent with being under the influence of a stimulant such as  
7 methamphetamine. The measured concentration of methamphetamine (179 ng/mL)  
8 found in his blood 11 hours after being admitted to the hospital, makes it medically  
9 probable that Mr. Harper was under the influence of methamphetamine at the time  
10 of his interaction with police on September 9, 2021, and his behavior was either  
11 contributed to or caused by intoxication with methamphetamine at that time.

12 Additionally, expert McFarlane will testify that the results of video and  
13 audio analysis; combined with the speed of sound calculations, determined the  
14 TASER was fired into 4.693 s prior to the first shot from Officer Koahou's  
15 firearm. Further, that Officer Koahou was in the doorway of the suspect vehicle at  
16 the time the first shot was fired. Shot 2 was fired .268 ms after shot one. The total  
17 time lapse from the TASER deployment until shot 2 sound report is 4.983 seconds.

18 Additionally, expert Flosi will testify that that the use of deadly force in this  
19 instance was reasonable, consistent with the officers' training, consistent with  
20 Redlands Police Department Policy, and consistent with contemporary policing  
21 practices. Flosi will further testify that the reaction time for an officer to recognize  
22 a threat, react to the threat and take action to neutralize the threat takes some time.  
23 It may be whole or fractions of seconds, but reactions take time to process while  
24 the incident, including suspect actions, often continue without pause. Further, Flosi  
25 will testify that Harper was less than an arm's reach away in a moving vehicle,  
26 committing a violent assault, and his actions created a reasonable belief of serious  
27 injury or death for Officer Koahou who believed he was about to be crushed or run  
28 over and had no other option to stop the threat Harper posed to him and the

bystanders but to fire his weapon.

## **2. Plaintiff's Second Claim for Battery**

Plaintiff's Second Claim for Relief is for Battery against all Defendants.

### **(a) Elements of the Second Claim**

To prove battery, Plaintiff Harper must demonstrate that (1) Officer Koahou touched Plaintiff Harper with the intent to harm him; (2) that Plaintiff Harper did not consent to the touching; and (3) that Plaintiff Harper was harmed by Officer Koahou's conduct. Ashcraft v. King, 228 Cal.App.3d 604 (1991); See also Judicial Council of California Civil Jury Instructions (CACI) § 1300. To prove intent, Plaintiff Harper must prove either that Officer Koahou intended to commit a battery upon him or were substantially certain that the battery would result from his conduct. Judicial Council of California Civil Jury Instructions (CACI) § 1320.

Moreover, because the claim is for battery by a police officer, Plaintiff Harper must prove that the force used against him was unreasonable. See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273 (1998) ("a prima facie battery is not established unless and until plaintiff proves unreasonable force was used"); see also Price v. City of San Diego, 990 F. Supp. 1230, 1244 (S.D. Cal. 1998) (Section 820.2 of the California Government Code immunizes police officers from battery claims if the force used was not unreasonable).

### **(b) Evidence in Opposition to the Second Claim**

See evidence in Section I.A.1.(b) above in reference to Plaintiff's First Claim for Relief .

## **3. Plaintiff's Third Claim for Negligence**

Plaintiff's Third Claim for Relief is for Negligence.

1 (a) **Elements of the Third Claim**

2 To establish a claim for negligence against Officer Koahou, Plaintiff must  
3 demonstrate that (1) Officer Koahou had a legal duty to use due care; (2) that  
4 Officer Koahou breached that duty; and that (3) the breach was the proximate or  
5 legal cause of the resulting injury to Harper. See Toomey v. Southern Pac. R. Co.  
6 (1890) 86 Cal. 374, 381. A person is negligent if he or she does something that a  
7 reasonably careful person would not do in the same situation or fails to do  
8 something that a reasonably careful person would do in the same situation. Judicial  
9 Council of California Civil Jury Instructions (CACI) § 401.

10 (b) **Evidence in Opposition to the Third Claim**

11 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
12 Claim for Relief .

13  
14 **4. Plaintiff's Fourth Claim for Violation Civil Code § 52.1**

15 Plaintiff's Fourth Claim for Relief is for Violation of California Civil Code  
16 section 52.1 against all Defendants.

17 (a) **Elements of the Fourth Claim**

18 To establish a claim for a violation of California Civil Code section 52.1  
19 against Officer Koahou, Harper must demonstrate (1) Officer Koahou intentionally  
20 interfered or attempted to interfere with Harper's civil rights; (2) By threats,  
21 intimidation, or coercion. Cal.Civil.Code § 52.1; Jones v. Kmart Corp., 17 Cal.4th  
22 329 (1998); Venegas v. County of Los Angeles, 32 Cal.4th 820, 841–843 (2004);  
23 see also Judicial Council of California Civil Jury Instructions (CACI) §3066.  
24 While a finding of a constitutional violation in an excessive force claim is  
25 sufficient to satisfy the “intimidation or coercion” element of *Civil Code* § 52.1,  
26 the Bane Act imposes an additional requirement beyond finding a constitutional  
27 violation (i.e., plaintiff must show officer had the *specific intent* to violate the  
28 suspect's rights). Cornell v. San Francisco, 17 Cal.App.5<sup>th</sup> 766 (2017).

(b) **Evidence in Opposition to the Fourth Claim**

See evidence in Section I.A.1.(b) above in reference to Plaintiff's First Claim for Relief .

**B. Summary of Affirmative Defenses [L.R. 16-4.1(d)]**

In addition to disputing Plaintiff's claims, the City and Officer Koahou have pled and plan to pursue the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE (Assumption of Risk): Justin Harper voluntarily assumed all risks, responsibility and liability for the alleged injuries or damages, if any, sustained by Justin Harper.

THIRD AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.2): The state law claims in the Complaint are barred by the provisions of Government Code section 820.2. Specifically, except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him/her, whether or not such discretion be abused.

FOURTH AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.4): The state law claims in the Complaint are barred by the provisions of Government Code section 820.4. Specifically, a public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law.

FIFTH AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.8): The state law claims in the Complaint are barred by the provisions of Government Code section 820.8. Specifically, except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person.

1 EIGHTH AFFIRMATIVE DEFENSE: (Claims Barred by Govt. Code § 845.8): The state  
2 law claims in the Complaint are barred by the provision of Government Code section  
3 845.8. Specifically, neither a public entity, nor a public employee is liable for any injury  
4 caused by (1) an escaping or escaped prisoner; (2) an escaping or escaped arrested  
5 person; or (3) a person resisting arrest.

6  
7 TWELFTH AFFIRMATIVE DEFENSE (Speculative Damages): Defendants allege that  
8 Plaintiff's claims for damages are barred, either in whole or in part, because Plaintiff's  
9 purported damages are remote, speculative and/or unavailable as a matter of law.

10  
11 THIRTEENTH AFFIRMATIVE DEFENSE (Lawful Conduct): Defendants allege  
12 that their conduct was at all times reasonable and lawful under the circumstances.

13  
14 SIXTEENTH AFFIRMATIVE DEFENSE (Failure to Mitigate Damages):  
15 Defendants allege that that though under a duty to do so, Plaintiff has failed and  
16 neglected to mitigate the alleged damages, and therefore cannot recover against  
17 Defendants whether as alleged, or otherwise. Defendants are informed and believes  
18 and thereon allege that Plaintiff failed to exercise h duty to mitigate and limit their  
19 damage claim as to Defendants, which acts and omissions by Plaintiff have  
20 estopped Plaintiff from asserting any claim for damages or seeking the relief  
21 requested against Defendants.

22  
23 TWENTIETH AFFIRMATIVE DEFENSE (Acts or Omissions of Plaintiff): Defendants  
24 allege that, to the extent Plaintiff suffered any damages, they were caused solely by the  
25 actions or omissions of Plaintiff.

1 TWENTY-FIRST AFFIRMATIVE DEFENSE (Comparative Negligence): The  
2 negligence claim is barred and/or subject to offset and reduction by virtue of the  
3 comparative negligence of Plaintiff.  
4

5 TWENTY-SECOND AFFIRMATIVE DEFENSE (Apportionment): If it is found that  
6 Officer Koahou is legally responsible for the damages, if any, which Officer Koahou  
7 specifically denies, then such damages were proximately caused by or contributed to by  
8 Plaintiff or others, whether served or not, and it is necessary that the proportionate degree  
9 of fault of every such person be determined and prorated by the trier of fact, and that any  
10 judgment which might be rendered against any Officer Koahou be reduced by that  
11 percentage of fault to be found to exist of Plaintiff or others and causative fault, whether  
12 sued herein or not.  
13

14 TWENTY-THIRD AFFIRMATIVE DEFENSE (Offset): Defendants allege that any  
15 amount for which it is held liable and owing to Plaintiff is offset by any and all amounts  
16 recovered by Plaintiff from any other responsible parties, such that Defendants' liability  
17 will be reduced in an amount corresponding to those recovered by Plaintiff from such  
18 other responsible parties.  
19

20 TWENTY-FOURTH AFFIRMATIVE DEFENSE (Claims Barred Due to Exercise  
21 of Reasonable Force): Defendants allege that each and every claim for relief  
22 contained in the Complaint is barred because, at all times mentioned therein,  
23 Defendants allege that no more force, if any, was used on Plaintiff's person than  
24 was necessary to effect detention, overcome any resistance thereto, prevent escape  
25 thereon, and prevent injury to Defendants and others, and that such force, if any,  
26 was reasonable under the circumstances.  
27  
28

1 TWENTY-FIFTH AFFIRMATIVE DEFENSE (Claims Barred Due to Reasonable  
2 and Probable Cause to Detain): Defendants allege that each and every claim for  
3 relief contained in the Complaint is barred because, at all times mentioned therein,  
4 Defendants had reasonable and probable cause to detain and restrain Plaintiff.

5  
6 TWENTY-SIXTH AFFIRMATIVE DEFENSE (Qualified Immunity): Officer Koahou  
7 alleges that the First Claim for Relief is barred because Officer Koahou is entitled to  
8 qualified immunity.

9  
10 TWENTY-SEVENTH AFFIRMATIVE DEFENSE (Privilege): Any actions  
11 undertaken by Officer Koahou with regard to Plaintiff were privileged.

12  
13 **C. Elements Required to Establish Affirmative Defenses and**  
14 **Evidence in Support of Affirmative Defenses [L.R. 16-4.1(e) and**  
15 **(f)]**

16 FIRST AFFIRMATIVE DEFENSE (Assumption of Risk)

17 1. Elements of an Affirmative Defense for Assumption of Risk

18 Defendants allege that Plaintiff assumed the risk of his alleged injuries in  
19 actively resisting arrest by Officer Koahou -- an activity that carries inherent risk.  
20 "Primary assumption of risk arises where a plaintiff voluntarily participates in an  
21 activity or sport involving certain inherent risks; primary assumption of risk ...  
22 bar[s] recovery because no duty of care is owed as to such risks." (Connelly v.  
23 Mammoth Mountain Ski Area (1995) 39 Cal.App.4th 8, 11( internal citations  
24 omitted.)

25  
26 2. Evidence in Support of Affirmative Defense for Assumption of Risk

27 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
28 Claim for Relief .



1 THIRD AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.2)

2 1. Elements of an Affirmative Defense Under Government Code § 820.2

3 California Government Code section 820.2 grants immunity to public employees  
4 by providing: "Except as otherwise provided by statute, a public employee is not liable  
5 for an injury resulting from his act or omission where the act of omission was the result  
6 of the exercise of the discretion vested in him, whether or not such discretion be abused."  
7 It provides immunity to peace officers for their discretionary acts in arrest situations as  
8 long as the force used was reasonable. See Price, 990 F. Supp. at 1244; see also Ritschel,  
9 137 Cal. App. 4th 107 at 124.

10  
11 2. Evidence in Support of Affirmative Defense Under Government Code  
12 § 820.2

13 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
14 Claim for Relief .

15  
16 FOURTH AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.4)

17 1. Elements of an Affirmative Defense Under Government Code § 820.4

18 California Government Code section 820.4 grants immunity to public employees  
19 by providing: "A public employee is not liable for his act or omission, exercising due  
20 care, in the execution or enforcement of any law."

21  
22 2. Evidence in Support of Affirmative Defense Under Government Code  
23 § 820.4

24 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
25 Claim for Relief .

1 FIFTH AFFIRMATIVE DEFENSE (Claims Barred by Govt. Code § 820.8)

2 1. Elements of an Affirmative Defense Under Government Code § 820.8

3 California Government Code section 820.8 grants immunity to public employees  
4 by providing: "Except as otherwise provided by statute, a public employee is not liable  
5 for an injury caused by the act or omission of another person."  
6

7 2. Evidence in Support of Affirmative Defense Under Government Code  
8 § 820.8

9 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
10 Claim for Relief .  
11

12 EIGHTH AFFIRMATIVE DEFENSE: (Claims Barred by Govt. Code § 845.8)

13 1. Elements of an Affirmative Defense Under Government Code § 845.8

14 California Government Code section 845.8 grants immunity to public employees  
15 by providing: "Neither a public entity, nor a public employee is liable for any injury  
16 caused by (1) an escaping or escaped prisoner; (2) an escaping or escaped arrested  
17 person; or (3) a person resisting arrest."  
18

19 2. Evidence in Support of Affirmative Defense Under Government Code  
20 § 845.8

21 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
22 Claim for Relief .  
23

24 TWELFTH AFFIRMATIVE DEFENSE (Speculative Damages)

25 1. Elements of Speculative Damages Affirmative Defense

26 Speculative damages cannot be awarded in civil rights cases. Gunby v.  
27 Pennsylvania Electric Co., 840 F.2d 1108 (3d Cir. 1988). "Whatever its measure in  
28 a given case, it is fundamental that 'damages which are speculative, remote,

1 imaginary, contingent, or merely possible cannot serve as a legal basis for  
2 recovery.' However, recovery is allowed if claimed benefits are reasonably certain  
3 to have been realized but for the wrongful act of the opposing party." Piscitelli v.  
4 Friedenberg 87 Cal.App.4th 953, 989 (2001) [internal citations omitted].

5  
6 2. Evidence in Support of Speculative Damages Affirmative Defense

7 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
8 Claim for Relief .

9  
10 THIRTEENTH AFFIRMATIVE DEFENSE (Lawful Conduct)

11 1. Elements of Lawful Conduct Affirmative Defense

12 "It is not constitutionally unreasonable to prevent escape using deadly force  
13 '[w]here the officer has probable cause to believe that the suspect poses a threat of  
14 serious physical harm, either to the officer or to others.'" Wilkinson v. Torres, 610  
15 F.3d 546, 551 (9th Cir.2010) *quoting* Garner, 471 U.S. at 11. Further, police  
16 officers are privileged by statute to use force to make an arrest, prevent escape, or  
17 overcome resistance, so long as the force used is not excessive. See Cal. Penal  
18 Code § 835a; See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273, 1272-  
19 73 (1998).

20 2. Evidence in Support of Lawful Conduct Affirmative Defense

21 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
22 Claim for Relief .

23  
24 SIXTEENTH AFFIRMATIVE DEFENSE (Failure to Mitigate Damages)

25 1. Elements of Affirmative Defense for Failure to Mitigate Damages

26 Plaintiff must make reasonable efforts to mitigate damages. Valle de Oro  
27 Bank v. Gamboa, 26 Cal.App.4th 1686, 1691 (1994). To prove this affirmative  
28 defense, Defendants must show by a preponderance of the evidence that (1) that

1 the plaintiff failed to use reasonable efforts to mitigate damages and (2) the amount  
2 by which damages would have been mitigated. Ninth Circuit Manual of Model  
3 Jury Instructions: Civil § 5.3 (2017).

4 2. Evidence in Support of Failure to Mitigate Damages Affirmative  
5 Defense

6 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
7 Claim for Relief.

8  
9 TWENTIETH AFFIRMATIVE DEFENSE (Acts or Omissions of Plaintiff)

10 1. Elements of Acts or Omissions of Plaintiff Affirmative Defense

11 "Damages are monetary compensation awarded to parties who suffer detriment *for*  
12 *the unlawful act or omission of another*; they are assessed by a court against wrongdoers  
13 for the commission of a legal wrong of a private nature." Meister v. Mensinger, 230  
14 Cal.App.4th 381, 396 (2014) [emphasis added]; See also Judicial Council of California  
15 Civil Jury Instructions (CACI) § 3900. A plaintiff cannot recover damages for detriment  
16 caused by their own acts or omissions. Id.

17  
18 2. Evidence in Support of Acts or Omissions of Plaintiff Affirmative  
19 Defense

20 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
21 Claim for Relief .

22  
23 TWENTY-FIRST AFFIRMATIVE DEFENSE (Comparative Negligence)

24 1. Elements of an Affirmative Defense for Comparative Negligence

25 Officer Koahou alleges that Justin Harper's own negligence contributed, in whole  
26 or in part, to his alleged injuries. To prove this affirmative defense, Officer Koahou must  
27 show (1) That Justin Harper was negligent and (2) That Justin Harper's negligence was a  
28 substantial factor in causing her harm. See Judicial Council of California Civil Jury

1 Instructions (CACI) § 405. If Officer Koahou proves the above, Plaintiff's damages  
2 should be reduced by the jury's determination of the percentage of Justin Harper's  
3 responsibility. Id.

4  
5 2. Evidence in Support of Affirmative Defense for Comparative  
6 Negligence

7 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
8 Claim for Relief .

9  
10 TWENTY-SECOND AFFIRMATIVE DEFENSE (Apportionment)

11 1. Elements of an Affirmative Defense for Apportionment

12 Officer Koahou alleges that the negligence or fault of Justin Harper or third parties  
13 contributed to Plaintiff's harm, if any. To prove this affirmative defense, Officer Koahou  
14 must show that: (1) That Justin Harper or third parties were negligent or otherwise at  
15 fault; and (2) That Justin Harper or third parties' negligence or fault was a substantial  
16 factor in causing Justin Harper's harm, if any. See Judicial Council of California Civil  
17 Jury Instructions (CACI) § 406. If the negligence or fault of Justin Harper or third parties  
18 was a substantial factor in causing Justin Harper's harm, then the proportionate degree of  
19 fault of every such person be determined and prorated by the trier of fact, and that any  
20 judgment which might be rendered against Officer Koahou be reduced by that percentage  
21 of fault to be found to exist of Justin Harper or others and causative fault, whether sued  
22 herein or not.

23  
24 2. Evidence in Support of Affirmative Defense for Apportionment

25 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
26 Claim for Relief.

1 TWENTY-THIRD AFFIRMATIVE DEFENSE (Offset)

2 1. Elements of an Affirmative Defense for Offset

3 Officer Koahou alleges that Justin Harper's own negligence contributed, in whole  
4 or in part, to his alleged injuries. To prove this affirmative defense, Officer Koahou must  
5 show (1) That Justin Harper was negligent and (2) That Justin Harper's negligence was a  
6 substantial factor in causing her harm. See Judicial Council of California Civil Jury  
7 Instructions (CACI) § 405. If Officer Koahou proves the above, Plaintiff's damages  
8 should be offset by the jury's determination of the percentage of Justin Harper's  
9 responsibility. Id.

10  
11 2. Evidence in Support of Affirmative Defense for Offset

12 See evidence in Section I.A.1.(b) above in reference to Plaintiff's First  
13 Claim for Relief .

14  
15 TWENTY-FOURTH AFFIRMATIVE DEFENSE (Claims Barred Due to Exercise  
16 of Reasonable Force)

17 1. Elements of Exercise of Reasonable Force Affirmative Defense

18 "It is not constitutionally unreasonable to prevent escape using deadly force  
19 '[w]here the officer has probable cause to believe that the suspect poses a threat of  
20 serious physical harm, either to the officer or to others.'" Wilkinson v. Torres, 610  
21 F.3d 546, 551 (9th Cir.2010) *quoting* Garner, 471 U.S. at 11. Further, police  
22 officers are privileged by statute to use force to make an arrest, prevent escape, or  
23 overcome resistance, so long as the force used is not excessive. See Cal. Penal  
24 Code § 835a; See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273, 1272-  
25 73 (1998).

2. Evidence in Support of Exercise of Reasonable Force Affirmative Defense

See evidence in Section I.A.1.(b) above in reference to Plaintiff's First Claim for Relief .

TWENTY-FIFTH AFFIRMATIVE DEFENSE (Claims Barred Due to Reasonable and Probable Cause to Detain)

1. Elements of Reasonable and Probable Cause to Detain Affirmative Defense

Under Terry v. Ohio, 392 U.S. 1 (1968), the police may conduct “a brief, investigatory search or seizure, so long as they have a reasonable, articulable suspicion that justifies their actions.” Gallegos v. City of Los Angeles, 308 F.3d 987, 990 (9th Cir.2002); See also Ninth Circuit Manual of Model Jury Instructions: Civil § 9.21 (2023). The reasonable suspicion standard applied to investigatory stops is “a less demanding standard than probable cause,” and merely requires “a minimal level of objective justification.” See Allen v. City of Los Angeles, 66 F.3d 1052, 1056–57 (9th Cir.1995); see also United States v. Jacobs, 715 F.2d 1343, 1345–46 (9th Cir.1983) *quoting Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). In determining whether officers had reasonable suspicion to justify a brief seizure, courts must “look at the totality of the circumstances of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” United States v. Arvizu, 534 U.S. 266, 273 (2002). This approach allows officers to “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available” to them. Id. In Whren v. United States, 517 U.S. 806, 166 S.Ct. 1769 (1996), the Supreme Court held that a traffic stop for an observed infraction is reasonable under the Fourth Amendment. See Whren, 517 U.S. at 810. The Supreme Court noted that investigatory traffic stops are akin to the on-the-street encounters



1 addressed in Terry, supra.

2 “A claim for unlawful arrest is cognizable under § 1983 as a violation of  
3 the Fourth Amendment, provided the arrest was without probable cause or other  
4 justification.” Lacey v. Maricopa County, 693 F.3d 896, 918 (9th Cir. 2012)  
5 (citation omitted); See also Ninth Circuit Manual of Model Jury Instructions: Civil  
6 § 9.23 (2024). “Probable cause exists if the arresting officers had knowledge and  
7 reasonably trustworthy information of facts and circumstances sufficient to lead a  
8 prudent person to believe that [the arrestee] had committed or was committing a  
9 crime.” Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1097-98 (9th Cir. 2013)  
10 (alteration in original) *quoting* Maxwell v. County of San Diego, 697 F.3d 941,  
11 951 (9th Cir. 2012)). “To determine whether an officer had probable cause for an  
12 arrest, we examine the events leading up to the arrest, and then decide whether  
13 these historical facts, viewed from the standpoint of an objectively reasonable  
14 police officer, amount to probable cause. Because probable cause deals with  
15 probabilities and depends on the totality of the circumstances, it is a fluid concept  
16 that is not readily, or even usefully, reduced to a neat set of legal rules. It requires  
17 only a probability or substantial chance of criminal activity, not an actual showing  
18 of such activity. Probable cause is not a high bar.” District of Columbia v. Wesby,  
19 138 S. Ct. 577, 586 (2018) (internal quotations and citations omitted); see also  
20 Miller v. City of Scottsdale, 88 F.4th 800, 804 (9th Cir. 2023).

21  
22 2. Evidence in Support of Reasonable and Probable Cause to Detain  
23 Affirmative Defense

24 See evidence in Section I.A.1.(b) above in reference to Plaintiff’s First  
25 Claim for Relief .  
26  
27  
28

TWENTY-SIXTH AFFIRMATIVE DEFENSE (Qualified Immunity)

1. Elements of Qualified Immunity Affirmative Defense

The defense of qualified immunity requires a two prong analysis. First, “taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right”? Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L. Ed. 2d 272 (2001). Second, if the plaintiff has succeeded in alleging a deprivation of a constitutional right, the plaintiff must still show that the constitutional right at issue was “clearly established.” Id.; Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993). The query for the Court under this second part of the test is “whether reasonable officers could have believed their conduct lawful under the clearly established principals of law governing that conduct.” Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9th Cir. 1995).

Police officers are presumed to be protected by qualified immunity. See Gasho v. United States, 39 F.3d 1420, 1438 (9th Cir. 1994). “To overcome this presumption [of qualified immunity protection], a plaintiff must show that the officer’s conduct was ‘so egregious that any reasonable person would have recognized a constitutional violation.’” Id. [internal citations omitted]. The standard is a demanding one. The contours of a right must be “sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.” Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) [emphasis added].

The U.S. Supreme Court has recently clarified that a governmental official is entitled to qualified immunity from suit/liability where, at the time of the conduct, there was no prior precedent or case law with facts specifically and substantially identical to the facts of the incident at issue which would have put the defendant on notice that his or her conduct was unconstitutional. White v. Pauly, 580 U.S. 73, 79 (2017) (“clearly established law” should not be defined “at a high level of

generality” but must be “particularized” to the facts of the case). The Supreme Court has emphasized this point again and again because qualified immunity is important to society as a whole and because the immunity from suit is effectively lost if a case is erroneously permitted to go to trial. *Id.* at 551-555.

Under the doctrine of qualified immunity, if a government official’s mistake as to what the law requires is reasonable, the government official is entitled to qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 205 (1984). Moreover, this doctrine is sweeping in scope and designed to protect “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Finally, although law enforcement officers must be aware of constitutional developments, they are not expected to do so to the same extent as law professors. Indeed, a “reasonable person” standard applies. *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986).

## 2. Evidence in Support of Qualified Immunity Affirmative Defense

See evidence in Section I.A.1.(b) above in reference to Plaintiff’s First Claim for Relief as to the first prong. As to the second prong, *Plumhoff v. Rickard*, 572 U.S. 765 (2014), *Monzon v. City of Murrieta*, 978 F.3d 1150 (9th Cir. 2020), *Williams v. City of Grosse Pointe Park*, 496 F.3d 482 (6th Cir. 2007) are all, and in some cases extremely, factually similar to the situation faced by Officer Koahou. In each, the firing officer or officers were found to have acted reasonably.

## TWENTY-SEVENTH AFFIRMATIVE DEFENSE (Privilege)

### 1. Elements of Privilege Affirmative Defense

“It is not constitutionally unreasonable to prevent escape using deadly force ‘[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.’” *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir.2010) *quoting* *Garner*, 471 U.S. at 11. Further, police

officers are privileged by statute to use force to make an arrest, prevent escape, or overcome resistance, so long as the force used is not excessive. See Cal. Penal Code § 835a; See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273, 1272-73 (1998).

2. Evidence in Support of Privilege Affirmative Defense

See evidence in Section I.A.1.(b) above in reference to Plaintiff's First Claim for Relief

**D. Evidentiary Issues [L.R. 16-4.1(h)]**

The City and Officer Koahou filed the following Motions in Limine:

1. Motion in Limine No. 1 to exclude economic calculation of damages and exclude any argument of a specific dollar amount for damages.

**E. Issues of Law [L.R. 16-4.1(i)]**

The primary issues of law are whether the force used by the Defendant Officer Koahou was objectively reasonable under the circumstances. Additionally, are the issues of whether the actions of Officer Koahou are privileged and whether Officer Koahou is entitled to qualified immunity.

**III. BIFURCATION OF ISSUES [L.R. 16-4.3]**

The Parties seek and have stipulated to bifurcation of issues as follows:  
Phase 1 – Liability, compensatory damages, and predicate findings with regard to punitive damages, if any. Phase 2 – Amount of punitive damages, if any.

**IV. JURY TRIAL [L.R. 16-4.4]**

Plaintiffs have demanded a jury trial. The City and Officer Koahou estimates trial will last five (5) to seven (7) days total to complete.

1 **V. ATTORNEYS' FEES [L.R. 16-4.5]**

2 The Court may award, in its discretion, reasonable attorneys' fees to the  
3 prevailing party pursuant to 42 U.S.C. § 1988(b).

4  
5 **VI. ABANDONMENT OF ISSUES [L.R. 16-4.6]**

6 The City and Officer Koahou abandon their Second, Sixth, Seventh,  
7 Tenth, Eleventh, Fourteenth, Fifteenth, Seventeenth, Eighteenth, and Nineteenth  
8 Affirmative Defenses.

9  
10 Dated: March 20, 2025

Respectfully submitted,  
JONES MAYER

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12  
13 By: s/ Denise L. Rocawivh  
14 JAMES R. TOUCHSTONE  
15 DENISE LYNCH ROCAWICH  
16 Attorneys for City of Redlands and  
17 Officer Koahou  
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